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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/680,358	10/07/2003	Frank J. Schwab	MSDI-245/PC819.00	5654
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MEDTRONIC				
Attn: Noreen Johnson - IP Legal Department				
2600 Sofamor Danck Drive				
MEMPHIS, TN 38132				
EXAMINER				
WOODALL, NICHOLAS W				
ART UNIT		PAPER NUMBER		
3775				
MAIL DATE		DELIVERY MODE		
02/25/2010		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

***Advisory Action  
Before the Filing of an Appeal Brief***

**Application No.**

10/680,358

**Applicant(s)**

SCHWAB ET AL.

**Examiner**

Nicholas Woodall

**Art Unit**

3775

—The MAILING DATE of this communication appears on the cover sheet with the correspondence address —

THE REPLY FILED 10 February 2010 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires \_\_\_\_\_ months from the mailing date of the final rejection.  
 b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.  
 Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

#### AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
 (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);  
 (b) ☐ They raise the issue of new matter (see NOTE below);  
 (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
 (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
 5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
 6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
 7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
 The status of the claim(s) is (or will be) as follows:  
 Claim(s) allowed: 11, 38 and 49.  
 Claim(s) objected to: 31, 53 and 56.  
 Claim(s) rejected: 1-3, 19, 22-27, 29, 30, 32-40 and 49-51.  
 Claim(s) withdrawn from consideration: \_\_\_\_\_.

#### AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
 9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
 10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

#### REQUEST FOR RECONSIDERATION/OTHER

11. ☐ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: \_\_\_\_\_.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_.
13. ☒ Other: The applicant's arguments with respect to claims 1-3, 19, 22-27, 29, 30, 32-40, and 49-51 are not persuasive. The applicant's argument that the Dillhoff reference does not disclose a device wherein the frame is structured to move the guide member parallel to each other is not persuasive. As discussed in the previous office action the term "structured" is a functional term making the limitation of the claim a functional limitation, and the reference only needs to disclose a device capable of providing that function if one so desired. The Dillhoff reference discloses elements 45 and 46 that are pivotally connected to the arms, which allows elements 45 and 46 to pivot as the arms are moved up and down providing the capability of the surfaces of elements 45 and 46 to remain parallel during movement of the arms. The applicant further argues that the reference does not disclose a structure or method of elements 45 and 46 remaining parallel during movement of the arms. The pivot connection between elements 45 and 46 are the structure that allows the elements the capability of remaining parallel during movement of the arms. The examiner would like to note, "A claim containing a recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus" if the prior art apparatus teaches all the structural limitations of the claim. Ex parte Masham, 2 USPQ2d 1647 (Bd. Pat. App. & Inter. 1987)" (see MPEP 2114. The Dillhoff reference discloses all the structural limitations of the claim and is capable of performing the functional language. Therefore, the Dillhoff reference discloses all the limitations of the claims as presented. The applicant's argument that the Dillhoff reference does not disclose the arms coupled to the proximal ends of elements 45 and 46 because the examiner's interpretation of the ends of elements 45 and 46 as discussed in the previous office action is improper is not persuasive. The applicant argues that elements 45 and 46 cannot be interpreted as having a distal end that incorporates the entire distal half and a proximal end that incorporates the entire proximal half. A broad definition of the term end is part or place at or adjacent the extremity (www.dictionary.com). Therefore, the entire portion of elements 45 and 46 that form the middle to the extremity can be

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